

## LEGISLATIVE BILL 385

Approved by the Governor April 13, 2006

Introduced by Johnson, 37; Price, 26

AN ACT relating to criminal procedure; to amend sections 29-2262, 29-4101, 29-4102, 29-4103, 29-4104, 29-4105, 29-4106, 29-4107, 29-4108, 29-4109, 29-4112, 29-4113, 29-4114, and 29-4115, Revised Statutes Cumulative Supplement, 2004; to provide a condition of probation; to rename and change provisions of the DNA Detection of Sexual and Violent Offenders Act; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 29-2262, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-2262 (1) When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life. No offender shall be sentenced to probation if he or she is deemed to be a habitual criminal pursuant to section 29-2221.

(2) The court may, as a condition of a sentence of probation, require the offender:

- (a) To refrain from unlawful conduct;
  - (b) To be confined periodically in the county jail or to return to custody after specified hours but not to exceed (i) for misdemeanors, the lesser of ninety days or the maximum jail term provided by law for the offense and (ii) for felonies, one hundred eighty days;
  - (c) To meet his or her family responsibilities;
  - (d) To devote himself or herself to a specific employment or occupation;
  - (e) To undergo medical or psychiatric treatment and to enter and remain in a specified institution for such purpose;
  - (f) To pursue a prescribed secular course of study or vocational training;
  - (g) To attend or reside in a facility established for the instruction, recreation, or residence of persons on probation;
  - (h) To refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;
  - (i) To possess no firearm or other dangerous weapon if convicted of a felony, or if convicted of any other offense, to possess no firearm or other dangerous weapon unless granted written permission by the court;
  - (j) To remain within the jurisdiction of the court and to notify the court or the probation officer of any change in his or her address or his or her employment and to agree to waive extradition if found in another jurisdiction;
  - (k) To report as directed to the court or a probation officer and to permit the officer to visit his or her home;
  - (l) To pay a fine in one or more payments as ordered;
  - (m) To pay for tests to determine the presence of drugs or alcohol, psychological evaluations, offender assessment screens, and rehabilitative services required in the identification, evaluation, and treatment of offenders if such offender has the financial ability to pay for such services;
  - (n) To perform community service as outlined in sections 29-2277 to 29-2279 under the direction of his or her probation officer;
  - (o) To be monitored by an electronic surveillance device or system and to pay the cost of such device or system if the offender has the financial ability;
  - (p) To participate in a community correctional facility or program as provided in the Community Corrections Act;
  - (q) To successfully complete an incarceration work camp program as determined by the Department of Correctional Services;
  - (r) To satisfy any other conditions reasonably related to the rehabilitation of the offender;
  - (s) To make restitution as described in sections 29-2280 and 29-2281; or
  - (t) To pay for all costs imposed by the court, including court costs and the fees imposed pursuant to section 29-2262.06.
- (3) In all cases in which the offender is guilty of violating section 28-416, a condition of probation shall be mandatory treatment and counseling as provided by such section.

(4) In all cases in which the offender is guilty of a crime covered by the DNA Identification Information Act, a condition of probation shall be the collecting of a DNA sample pursuant to the act prior to release on probation.

Sec. 2. Section 29-4101, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4101 Sections 29-4101 to 29-4115 shall be known and may be cited as the DNA Detection of Sexual and Violent Offenders Identification Information Act.

Sec. 3. Section 29-4102, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4102 The Legislature finds that DNA data banks are an important tool in criminal investigations, in the exclusion of individuals who are the subject of criminal investigations or prosecutions, ~~and~~ in deterring and detecting recidivist acts, and in locating and identifying missing persons and human remains. Several states have enacted laws requiring persons convicted of certain crimes, especially sex offenses, to provide genetic samples for DNA typing tests. Moreover, it is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in the identification and detection of individuals in criminal investigations and in locating and identifying missing persons and human remains. It is in the best interest of this state to establish a State DNA Data Base for DNA records and a State DNA Sample Bank as a repository for DNA samples from individuals convicted of felony sex offenses and other specified offenses and from individuals for purposes of assisting in locating and identifying missing persons and human remains.

Sec. 4. Section 29-4103, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4103 For purposes of the DNA Detection of Sexual and Violent Offenders Identification Information Act:

(1) Combined DNA Index System means the Federal Bureau of Investigation's national DNA identification index system that allows the storage and exchange of DNA records submitted by state and local forensic DNA laboratories;

(2) DNA means deoxyribonucleic acid which is located in the cells and provides an individual's personal genetic blueprint. DNA encodes genetic information that is the basis of human heredity and forensic identification;

(3) DNA record means the DNA identification information stored in the State DNA Data Base or the Combined DNA Index System which is derived from DNA typing test results;

(4) DNA sample means a blood, tissue, or bodily fluid ~~or tissue~~ sample provided by any person with ~~respect to~~ offenses covered by the DNA Detection of Sexual and Violent Offenders Identification Information Act for analysis or storage, or both;

(5) DNA typing tests means the laboratory procedures which evaluate the characteristics of a DNA sample which are of value in establishing the identity of an individual;

(6) Felony sex offense means a felony offense, or an attempt, conspiracy, or solicitation to commit a felony offense, under any of the following:

(a) Kidnapping of a minor pursuant to section 28-313, except when the person is the parent of the minor and was not convicted of any other offense in this subdivision;

(b) Incest of a minor pursuant to section 28-703;

(c) Sexual assault in the first or second degree pursuant to section 28-319 or 28-320;

(d) Sexual assault of a child pursuant to section 28-320.01;

(e) Sexual assault of a vulnerable adult pursuant to subdivision (1)(c) of section 28-386; and

(f) False imprisonment of a minor in the first degree pursuant to section 28-314, except when the person is the parent of the minor and was not convicted of any other offense in this subdivision;

(7) Law enforcement agency includes a police department, a town marshal, a county sheriff, and the Nebraska State Patrol;

(8) Other specified offense means an offense, or an attempt, conspiracy, or solicitation to commit an offense, under any of the following:

(a) Murder in the first degree pursuant to section 28-303;

(b) Murder in the second degree pursuant to section 28-304;

(c) Manslaughter pursuant to section 28-305; ~~or~~

(d) Stalking pursuant to sections 28-311.02 to 28-311.05; ~~and~~

(e) Burglary pursuant to section 28-507 provided that the real estate is a dwelling place intended for human occupancy; or

(f) Robbery pursuant to section 28-324; and

(9) Released means any release, parole, furlough, work release, prerelease, or release in any other manner from a prison, a jail, or any other detention facility or institution.

Sec. 5. Section 29-4104, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4104 The State DNA Data Base is established. The Nebraska State Patrol shall administer the State DNA Data Base and shall provide DNA records to the Federal Bureau of Investigation for storage and maintenance in the Combined DNA Index System. The patrol shall provide for liaison with the Federal Bureau of Investigation and other law enforcement agencies in regard to the state's participation in the Combined DNA Index System. The State DNA Data Base shall store and maintain DNA records related to:

(1) Forensic casework, including, but not limited to, forensic casework relating to missing persons, relatives of missing persons, and unidentified human remains;

(2) Convicted offenders required to provide a DNA sample under the DNA Detection of Sexual and Violent Offenders Identification Information Act; and

(3) Anonymous DNA records used for research or quality control; and

(4) Missing persons, relatives of missing persons, and unidentified human remains.

Sec. 6. Section 29-4105, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4105 (1) The Nebraska State Patrol shall prescribe procedures to be used in the collection, submission, identification, analysis, storage, and disposition of DNA samples in the State DNA Sample Bank and DNA records under the DNA Detection of Sexual and Violent Offenders Act in the State DNA Data Base. These procedures shall include quality assurance guidelines for laboratories which submit DNA records to the State DNA Data Base and shall also require that all laboratories be accredited by the American Society of Crime Laboratory Directors-LAB-Laboratory Accreditation Board or the National Forensic Science Technology Center or by any other national accrediting body or public agency which has requirements that are substantially equivalent to or more comprehensive than those of the society or center. The State DNA Data Base shall be compatible with the procedures specified by the Federal Bureau of Investigation, including the use of comparable test procedures, laboratory equipment, supplies, and computer software. The DNA records shall be securely stored in the State DNA Data Base and retained in a manner consistent with the procedures established by the Federal Bureau of Investigation.

(2) The Nebraska State Patrol may contract with the University of Nebraska Medical Center to establish the State DNA Sample Bank at the medical center and for DNA typing tests. The State DNA Sample Bank shall serve as the repository of DNA samples collected under the act. The DNA Identification Information Act and other forensic casework. Any such contract shall require that the University of Nebraska Medical Center in contracting under the act is be subject to the same restrictions and requirements of the act, insofar as applicable, as the Nebraska State Patrol, as well as any additional restrictions imposed by the patrol.

(3) The DNA samples and DNA records shall only be used by the Nebraska State Patrol (a) to create a separate population data base comprised of DNA records obtained under the act after all personal identification is removed and (b) for quality assurance, training, and research purposes related to human DNA identification. The patrol may share or disseminate the population data base with other law enforcement agencies or forensic DNA laboratories which assist the patrol with statistical data bases. The population data base may be made available to and searched by other agencies participating in the Combined DNA Index System.

(4) Except for records and samples expunged under section 29-4109, the Nebraska State Patrol shall permanently retain DNA samples and records of an individual obtained under section 29-4106. Any other DNA samples and records related to forensic casework, other than those used for research or quality control, shall not be permanently retained but shall be retained only as long as needed for a criminal investigation or criminal prosecution.

(5) If the Nebraska State Patrol determines after analysis that a forensic sample has been submitted by an individual who has been eliminated as a suspect in a crime, the patrol or the law enforcement agency which submitted the sample shall destroy the DNA sample and record in the presence of a witness. After destruction, the patrol or law enforcement agency shall make and keep a written record of the destruction, signed by the individual who witnessed the destruction. After the patrol or the law enforcement agency

destroys the DNA sample and record, it shall notify the individual if he or she is not a minor or the parent or legal guardian of a minor by certified mail that the sample and record have been destroyed. Destruction of a DNA sample and record under this section shall not be considered the offense of tampering with physical evidence under section 28-922.

Sec. 7. Section 29-4106, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4106 (1) A person who is convicted of a felony sex offense or other specified offense on or after September 13, 1997 the effective date of this act, who does not have a DNA sample available for use in the State DNA Sample Bank, shall have a DNA sample ~~drawn~~ collected:

(a) Upon intake to a prison, jail, or other detention facility or institution to which such person is sentenced. If the person is already confined at the time of sentencing, the person shall have a DNA sample ~~drawn~~ collected immediately after the sentencing. Such DNA samples shall be ~~drawn~~ collected at the place of incarceration or confinement. Such person shall not be released unless and until a DNA sample has been ~~drawn~~ collected; or

(b) As a condition for any sentence which will not involve an intake into a prison, jail, or other detention facility or institution. Such DNA samples shall be ~~drawn~~ collected at a detention facility or institution as specified by the court. Such person shall not be released unless and until a DNA sample has been ~~drawn~~ collected.

(2) A person who has been convicted of a felony sex offense or other specified offense before September 13, 1997 the effective date of this act, who does not have a DNA sample available for use in the State DNA Sample Bank, and who is still serving a term of confinement for such offense on September 13, 1997 the effective date of this act, shall not be released prior to the expiration of his or her maximum term of confinement unless and until a DNA sample has been ~~drawn~~ collected.

Sec. 8. Section 29-4107, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4107 (1) Only individuals (a) who are physicians or registered nurses, (b) who are trained to withdraw human blood for scientific or medical purposes and are obtaining blood specimens while working under orders of or protocols and procedures approved by a physician, registered nurse, or other independent health care practitioner licensed to practice by the state if the scope of practice of that practitioner permits the practitioner to obtain blood specimens, or (c) who are both employed by a licensed institution or facility and have been trained to withdraw human blood for scientific or medical purposes shall ~~draw~~ withdraw blood for a DNA sample under the DNA Detection of Sexual and Violent Offenders Identification Information Act.

(2) In addition to the DNA sample, one thumb print or fingerprint shall be taken from the person from whom the DNA sample is being ~~drawn~~ collected for the exclusive purpose of verifying the identity of such person. The DNA sample and the thumb print or fingerprint shall be delivered to the Nebraska State Patrol within five working days after ~~drawing~~ collecting the sample.

~~(3)~~ (3) A person authorized to ~~draw~~ collect DNA samples under ~~this section the act~~ is not criminally liable for ~~drawing~~ collecting a DNA sample and transmitting DNA records pursuant to the act if he or she performs these activities in good faith and is not civilly liable for such activities if he or she performed such activities in a reasonable manner according to generally accepted medical and other professional practices.

Sec. 9. Section 29-4108, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4108 (1) All DNA samples and DNA records submitted ~~pursuant to the DNA Detection of Sexual and Violent Offenders Act to the State DNA Sample Bank or the State DNA Data Base~~ are confidential except as otherwise provided in the ~~act~~ DNA Identification Information Act. The Nebraska State Patrol shall make DNA records in the State DNA Data Base available:

(a) To law enforcement agencies and forensic DNA laboratories which serve such agencies; and

(b) Upon written or electronic request and in furtherance of an official investigation of a criminal offense or offender or suspected offender.

(2) The Nebraska State Patrol shall adopt and promulgate rules and regulations governing the methods of obtaining information from the State DNA Data Base and the Combined DNA Index System and procedures for verification of the identity and authority of the requester.

(3) The Nebraska State Patrol may, for good cause shown, revoke or suspend the right of a forensic DNA laboratory in this state to have access to or submit records to the State DNA Data Base.

(4) For purposes of this subsection, person means a law enforcement agency, the Federal Bureau of Investigation, any forensic DNA laboratory, or person. No records or DNA samples shall be provided to any person unless such person enters into a written agreement with the Nebraska State Patrol to comply with the provisions of section 29-4109 relative to expungement, when notified by the Nebraska State Patrol that expungement has been granted. Every person shall comply with the provisions of section 29-4109 within ten calendar days of receipt of such notice and certify in writing to the Nebraska State Patrol that such compliance has been effectuated. The Nebraska State Patrol shall provide notice of such certification to the person who was granted expungement.

Sec. 10. Section 29-4109, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4109 A person whose DNA record has been included in the State DNA Data Base pursuant to the DNA Detection of Sexual and Violent Offenders Identification Information Act may request expungement on the grounds that the conviction on which the authority for including such person's DNA record was based has been reversed and the case dismissed. The Nebraska State Patrol shall purge all DNA records and identifiable information in the data base pertaining to the person and destroy all DNA samples from the person upon receipt of a written request for expungement pursuant to this section and a certified copy of the final court order reversing and dismissing the conviction.

Within ten calendar days of granting expungement, the Nebraska State Patrol shall provide written notice of such expungement pursuant to subsection (4) of section 29-4108, to any person to whom DNA records and samples have been made available. The Nebraska State Patrol shall establish procedures for providing notice of certification of expungement to the person who was granted expungement.

Sec. 11. Section 29-4112, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4112 The Nebraska State Patrol or any other aggrieved individual or agency may institute an action in a court of proper jurisdiction against any person, including law enforcement agencies, to enjoin such person or agency from violating the DNA Detection of Sexual and Violent Offenders Identification Information Act.

Sec. 12. Section 29-4113, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4113 The Nebraska State Patrol may recommend to the Legislature that the Legislature enact legislation for the inclusion of additional offenses for which DNA samples shall be ~~taken~~ collected and otherwise subjected to the DNA Detection of Sexual and Violent Offenders Identification Information Act. In determining whether to recommend additional offenses, the Nebraska State Patrol shall consider those offenses for which DNA testing will have a substantial impact on the detection and identification of sexual offenders and violent offenders.

Sec. 13. Section 29-4114, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4114 The Nebraska State Patrol shall adopt and promulgate rules and regulations to carry out the DNA Detection of Sexual and Violent Offenders Identification Information Act.

Sec. 14. Section 29-4115, Revised Statutes Cumulative Supplement, 2004, is amended to read:

29-4115 Except as provided in section 29-4105, the DNA Detection of Sexual and Violent Offenders Identification Information Act shall not limit or abrogate any existing authority of peace officers to ~~take~~ collect, maintain, store, and utilize DNA samples for law enforcement purposes.

Sec. 15. Original sections 29-2262, 29-4101, 29-4102, 29-4103, 29-4104, 29-4105, 29-4106, 29-4107, 29-4108, 29-4109, 29-4112, 29-4113, 29-4114, and 29-4115, Revised Statutes Cumulative Supplement, 2004, are repealed.